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PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 565

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Kathryn Jongebloed, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Robert Jongebloed, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Elaine Jongebloed, deceased,

Petitioner,

—vs.—

ERIE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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IN THE

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No.

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Kathryn Jongebloed, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Robert Jongebloed, deceased, and

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Petitioner,

—vs.—

ERIE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Herman C. Jongebloed, the plaintiff below, respectfully prays for a writ of certiorari herein to review a final judgment of the Supreme Court of the State of New York, County of New York, dismissing his complaint upon the merits, entered January 23rd, 1946, upon a verdict directed by the Trial Court, after trial before a jury, and which said judgment was affirmed by the Appellate Division of the

Supreme Court of the State of New York by order dated November 8th, 1946, upon which judgment of affirmance was entered in the office of the Clerk of New York County on November 20th, 1946, and upon appeal to the Court of Appeals of the State of New York, the highest Court of the said State, the order and judgment of the said Appellate Division of the Supreme Court, First Department, were affirmed by the said Court of Appeals on July 2nd, 1947, and upon the remittitur of the said Court of Appeals, its order and judgment were made the order and judgment of the Supreme Court of the State of New York, New York County, and judgment of affirmance entered thereon on July 14th, 1947, in the office of the Clerk of the County of New York, where the record in the said case now remains, an application for rehearing and reargument, after being entertained and considered, having been denied by the said Court of Appeals on October 2nd, 1947.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner, Herman C. Jongebloed, as administrator of the estate of his wife, Kathryn Jongebloed, deceased, and as administrator of the estates of his son, Robert, deceased, and his daughter, Elaine Jongebloed, deceased, brought this suit against the respondent, Erie Railroad Company, to recover damages on account of the deaths of his said wife, Kathryn, aged 36, his said son, Robert, aged 15, and his said daughter, Elaine, aged 10, which were sustained in a railroad crossing collision at what is known as the Central Avenue Crossing in Ramsey, New Jersey.

The accident occurred at about 3:13 in the afternoon of January 2nd, 1941 (fols. 254-255), with the weather variously described as overcast, kind of cloudy, and overcast with snow later (fols. 114, 182, 255, 266). The decedent, Kathryn Jongebloed, was driving her automobile, in which her children, Robert and Elaine, deceased, were passengers with her,

and was traveling along Island Road in a northerly direction toward the crossing where Island Road is crossed by respondent's four railroad tracks (fols. 107, 254), and when she reached the crossing, a long eastbound freight train was passing on the second track (fols. 107, 177) and she brought her automobile to a stop at a distance of 30 or 40 feet from the nearest rail of respondent's tracks (fols. 96, 97, 98), at the usual place where a car would come to a stop at the crossing (fols. 173-174), and her automobile remained stopped until the passing freight train had completely cleared the crossing (fols. 110, 177).

When the freight train had cleared the crossing, the decedent, Kathryn Jongebloed, started her automobile toward the crossing, moving very slowly (fol. 110), and as soon as it reached the first track it was struck by one of respondent's passenger trains traveling on that track and going in the same direction as the freight train on the second track, and only 400 or 500 feet behind the freight train, and moving at a speed of 45 or 50 miles per hour, with the result that the automobile was completely demolished and the three occupants were killed (fols. 110-112, 178, 247, 259, 262, 267; Pltf.'s Ex. 6, R., p. 250).

The crossing was unprotected by flagman or gates (fol. 274), but was equipped with automatic signals which went into operation when a train approached within 2500 feet of the crossing from either direction, and continued to operate until the entire train had passed a certain distance beyond the crossing (fols. 203-214). At the time of the accident, the crossing signals were in operation, having been activated by the passing freight train, and were not affected by the approaching passenger train and provided no warning of its approach (fols. 144-145, 203-214).

Photographs in evidence (R., pp. 251-255, 259-273, 279-295) and the map (R., p. 257), show the physical conditions at and near the crossing, and much evidence was adduced by plaintiff proving that the view to the west of the crossing, the direction from which both the freight train and the pas-

senger train came, was much obstructed, including the testimony of the engineer of respondent's passenger train that though he maintained a constant look out from the right side of his cab, the direction from which decedent's automobile was approaching, he was first able to see an automobile at the crossing (not the one involved in the accident) when his engine was only three or four car lengths from the crossing, a distance of 210 to 280 feet (fols. 260-263), and that he was not able to see decedent's automobile until his engine was only about one car length, about seventy feet from the crossing, and the automobile was already coming up on the track (fols. 261-262).

The petitioner adduced the evidence of Mrs. Corbett (fols. 95-161) and Mrs. Moore (fols. 162-191), eye witnesses to the accident, who were at the crossing in a position to see and hear all that occurred, and who described the accident in great detail and testified to hearing the crossing bell and the rumble of the passing freight train and other sounds, but who either did not hear or are not aware of having heard the whistle of the passenger train, or any other sound from the passenger train, apprising them of its approach, and who were not even aware of the approach of the passenger train until the instant of the collision, and the evidence of the witness Langla (fols. 272-282) who was observing the passing freight train and was in a position to hear its rumble as it passed, but who heard nothing to apprise him of the approach of the passenger train, and who did not hear the blowing of a whistle, except one long blast, at about the time that he became aware there had been an accident.

The petitioner had taken the depositions of the respondent's locomotive engineer and fireman, and upon such depositions, the engineer testified that he blew the whistle and rang the bell, whereas the fireman testified that the engineer blew the whistle, but he said nothing about the bell. When pressed for details, the engineer testified to having given four blasts of the whistle and that as he was giving the fourth blast he saw decedent's automobile coming up on the track,

and that he gave a final long blast, and he says that the blasts were a second or so apart. The testimony of the fireman, however, was that there were only three blasts of the whistle and then the engineer held down on the fourth blast and hollered "Oh, my God," and the collision happened immediately (fols. 236-263, 264-272).

The said testimony of respondent's engineer and fireman, even if believed by a jury, according to the most favorable version for respondent, seems to prove that the blowing of the whistle did not extend over a period of about four seconds from beginning to end, during which time the passenger train, going at the rate of fifty miles per hour, would be traveling only 300 feet.

There were three other members of the train crew, the conductor and two trainmen (fol. 241), but they were not called by the respondent, who failed to call any witnesses at all with reference to the blowing of the whistle or ringing of the bell.

The petitioner, on the trial, relied upon the common law and the rules of decision at common law, and on the presumption that the common law still prevailed in New Jersey, and that the common law of New Jersey was the same as the common law of New York, and it was petitioner's contention that the evidence adduced by him was sufficient to prove the failure of the passenger train to comply with the New Jersey Bell or Whistle Statute (N. J. S. A. 48:12-57), which is alleged in the complaint and was proved on trial, which prescribes that the engine bell must be rung or the engine whistle blown, beginning at a distance of 300 yards from the crossing, and continuing until after the engine has passed the crossing, and that such evidence was also sufficient to prove respondent's negligence in failing to comply with its common law duty of reasonable care in failing to give timely and adequate warning of the approach of the passenger train to the crossing.

It was also petitioner's contention that he was entitled to recover under the rule of *Royal Indemnity* v. *Long Island*

Railroad Company, 258 App. Div. 262, 16 N. Y. Supp. (2d) 243, affirmed by the New York Court of Appeals in 283 N. Y. 714, a case involving the same proposition as is involved in the case at bar, where the decedent, in that case, while driving an automobile proceeded to cross the tracks in reliance on the fact that the automatic warning signals were being activated by a visible train which was stopped near the crossing, and was struck and killed by an express train coming on another track.

In its opinion affirming the verdict for the plaintiff in that case, the Appellate Division of the Supreme Court, First Department, characterized the situation at the crossing, when the automatic signals were activated by a visible train and would not be affected by the approach of another train to the crossing, as a potentially dangerous condition, and it is also held in that case, following the rule laid down by the Court of Appeals, in *Maiorano* v. *Long Island Railroad Company*, 244 N. Y. 387, that it is not contributory negligence, as matter of law, to cross railroad tracks at a crossing although warning signals are flashing.

The answer filed by respondent, the defendant in the action at bar, failed to plead any alleged propositions of New Jersey law, and there was no proof or showing whatsoever on the trial as to what the law was in the State of New Jersey or that the common law did not still prevail in New Jersey, or that the common law of New Jersey was different from the common law of New York, but the Trial Court, nevertheless, at the end of the whole case, over petitioner's objection, granted respondent's motion for a directed verdict dismissing petitioner's complaint on the merits, and in directing such verdict the Court made findings (fols. 722-729) purporting to find certain propositions of New Jersey law, as to which there was no proof or showing on the trial and which petitioner, the plaintiff [illegible]uch action, had not been apprised were being conside[illegible]e Trial Court, and as to which he had no opportunity [illegible]e heard on the law or facts, or to object or except thereto, until after the rendition

and recording of the verdict dismissing the complaint and his three causes of action on the merits.

That by such findings the Trial Court, in effect, found that the common law rule of reasonable care by a railroad company, at railroad crossings, no longer prevailed in the State of New Jersey, and rejected the common law rules as known in New York State, and rejected the rule of *Royal Indemnity v. Long Island Railroad Company, supra*, and found that the law in the State of New Jersey was in direct opposition to the rule of that case, and that the situation there presented would not constitute negligence on the part of a railroad company in the State of New Jersey, but that, on the contrary, the act of the decedent in proceeding to cross the tracks while the warning signals were activated would constitute contributory negligence in the State of New Jersey, and he found that decedent, Kathryn Jongebloed, was guilty of contributory negligence, as matter of law, and by his finding that such contributory negligence would require a verdict for plaintiff to be set aside, he found that such contributory negligence of decedent, Kathryn Jongebloed, was imputable in the State of New Jersey to her deceased infant children. The findings made by the Court on the direction of the said verdict appear at folios 722-729 of the printed record, but, for greater convenience, the same are set out in full as an appendix to the petitioner's brief, annexed hereto.

By its refusal to submit petitioner's case to the jury, and by its direction of a verdict dismissing petitioner's complaint in such action on the merits, on the alleged propositions of New Jersey law, which were not pleaded, and without proof or showing thereof on the trial, and without notice to the petitioner, the plaintiff in such action, that such propositions were under consideration, and without the opportunity to the petitioner to be heard thereon as to the law and the facts, the petitioner, the plaintiff in such action, has been denied a full and fair hearing and has been deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

In adopting the method of trial followed by it, the Trial Court apparently acted under the authority of Section 344-a of the Civil Practice Act, which was added by the New York State Laws of 1943, and became effective September 1st, 1943, which expressly dispenses with pleading or proof of foreign law or the law of a sister state, and authorizes the Court to take judicial notice of such laws and to ascertain the same by independent inquiry and research, or by any means at its command, and requires that such law shall be determined by the Court itself and included in his findings or charged to the jury, and by the adoption of such method the Trial Court thereby rendered a decision in favor of the validity of said Section 344-a of the New York Civil Practice Act, the validity of which is drawn in question on the ground of being repugnant to and in contravention of the Fourteenth Amendment of the Constitution of the United States.

Judgment in favor of the defendant, on the directed verdict of the Trial Court, was entered in the office of the Clerk of New York County on January 23rd, 1946, and on appeal to the Appellate Division of the Supreme Court, First Department, the said judgment was unanimously affirmed by an order of such Appellate Division dated November 8th, 1946, upon whose remittitur to the Supreme Court, judgment of affirmance was entered in the office of the Clerk of New York County on November 20th, 1946.

That under the law of the State of New York, the affirmance by the Appellate Division of the Supreme Court having been unanimous, no appeal could be taken to the Court of Appeals, the highest Court of the State of New York, unless there was directly involved the construction of the Constitution of the State or of the United States, or unless an appeal was allowed either by the Appellate Division or the Court of Appeals.

In order to avail himself of every means of obtaining a review of the judgment and order of the Appellate Division, affirming the judgment entered on the directed verdict for respondent, the plaintiff moved in the Appellate Division of

the Supreme Court, First Judicial Department, for leave to appeal from the said judgment to the Court of Appeals of the State of New York, and thereafter, and prior to the decision of the said motion by the said Appellate Division, the petitioner filed an appeal from the said judgment to the Court of Appeals of the State of New York, as matter of right, on the ground that there was directly involved the construction of the Constitution of the State or of the United States, in that the method of trial constituted a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and that Section 344-a of the Civil Practice Act was repugnant to and in contravention of certain provisions of the New York State Constitution and of the Fourteenth Amendment of the Constitution of the United States.

The Appellate Division of the Supreme Court having, in the meantime, denied petitioner's motion for leave to appeal to the Court of Appeals, the respondent herein moved in the Court of Appeals to dismiss the appeal taken by petitioner to that Court, as matter of right, on the ground that no Constitutional question was involved or that the same had not been properly presented in the Courts below, and while the said motion was still pending and undetermined, the petitioner filed a motion in the Court of Appeals for leave to appeal to that Court.

That on February 28th, 1947, the Court of Appeals, in a memorandum decision reported in 296 N. Y. 12, 72 N. E. (2d) 627, denied the respondent's motion to dismiss the appeal to that Court, taken as of right by petitioner, the Court of Appeals holding that a substantial constitutional question was involved and had been properly presented in the Appellate Division, and thereafter, and on April 17th, 1947, the Court of Appeals, in a memorandum decision reported in 296 N. Y. 994, 73 N. E. (2d) 570, denied petitioner's motion for leave to appeal to that Court, on the ground that the appeal by petitioner to the Court of Appeals was a matter of right.

That on petitioner's appeal to the Court of Appeals from the judgment entered upon the directed verdict of the Trial Court dismissing the complaint, and from the judgment and order of the Appellate Division affirming the said judgment, the Court of Appeals, on July 2nd, 1947, affirmed the said judgment in all respects, without opinion (297 N. Y. 534, 74 N. E. (2d) 470), and upon the remittitur of the Court of Appeals to the Supreme Court, the order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court by order dated July 9th, 1947, and the record in the said case now remains in the Supreme Court of the State of New York, County of New York.

Thereafter, the petitioner moved in the Court of Appeals for a rehearing of his appeal to that Court, by motion returnable at the earliest possible date at which such motion could be made, but, after due deliberation, the said motion was denied by the Court of Appeals, by order dated October 2nd, 1947 (297 N. Y. 603, 75 N. E. (2d) 273).

JURISDICTION.

This case is one in which the petitioner asserts an invasion of his substantive rights under the Federal Constitution, in that the judgment of the Court of Appeals of the State of New York, affirming the judgment of the Courts below, dismissing his complaint and the causes of action alleged therein on the merits, has denied the petitioner an opportunity to be heard and to defend and protect his substantive rights in violation of his right to due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In rendering the judgment complained of and in the proceedings resulting in such judgment, the State Courts of New York apparently acted under the authority of Section 344-a of the Civil Practice Act of the State of New York, and there is therefore drawn in question the validity of a statute of the State of New York, on the ground that the same is repugnant

to the Fourteenth Amendment of the Constitution of the United States, and the decision of the New York State Courts is in favor of its validity.

The statute of the State of New York, the validity of which is involved, is known as Section 344-a of the Civil Practice Act of the State of New York. It was added by New York Laws of 1943, in effect September 1st, 1943. The same is set out in full in the appendix to petitioner's brief, annexed hereto.

Jurisdiction to entertain this petition is found in Section 237 of the Judicial Code (28 U. S. C. A., Sec. 344).

The original decision of the Court of Appeals affirming the judgment of the Appellate Division of the Supreme Court, First Department, which affirmed the judgment of the Supreme Court of the State of New York, New York County, was made on July 2nd, 1947, but, upon motion for rehearing in the Court of Appeals, brought on at the earliest date at which the same could be heard, the Court of Appeals, after deliberation, denied the application for reargument on October 2nd, 1947.

The time to file this petition for certiorari was extended to and including February 2nd, 1948, by order made by Mr. Associate Justice Jackson on December 31st, 1947.

QUESTIONS PRESENTED.

1. Whether Section 344-a of the New York State Civil Practice Act, which authorizes the Trial Court to decide cases before it according to propositions of law of a foreign or sister state, of its own choosing or adoption, and without pleading or proof thereof or any opportunity to be heard thereon during the trial, and without notice of their adoption until the end of the trial and their inclusion as findings in the Court's decision, or in its charge to the jury, is unconstitutional, as violative of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

2. Whether Section 344-a of the New York State Civil Practice Act, in so far as it authorized the Trial Court to decide plaintiff's case and to direct a verdict dismissing his complaint on the merits on propositions as to the law of the State of New Jersey, which were not pleaded by either side, and which were not proved on trial, and as to which petitioner was not apprised and given an opportunity to be heard on both the law and the facts, works a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the direction by the Trial Court, over petitioner's objection, of a verdict dismissing petitioner's complaint on the merits on the propositions of New Jersey law found by it (fols. 722-729), and which were not pleaded and were not proved on the trial, and which petitioner was not apprised were being considered by the Trial Court, and as to which he had no opportunity to be heard on the law and facts, constitutes a denial to petitioner of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE PETITION.

1. The State Courts of New York have decided an important Federal question arising under the Constitution of the United States not theretofore decided by this Court.

2. The State Courts of New York have decided an important Federal question arising under the Constitution of the United States in a way which is not in accord with the applicable decisions of this Court.

3. The petitioner claimed that under the due process clause of the Federal Constitution, he was required to be apprised on the trial as to any propositions of New Jersey law upon which his causes of action were to be decided, with the right to be heard thereon, both as to the law and facts, but the State Courts of New York, by their judgment, have denied this right to petitioner, and while the particular question in the precise form in which it is presented here does not seem to have been presented or decided in this Court, the decision of the New York State Courts is not in accord with the decisions of this Court, which have been consistent in holding that due process of law, guaranteed by the Fourteenth Amendment of the Federal Constitution, requires that a party be apprised of the questions presented for trial and that he have an opportunity to be heard as to both the law and facts.

4. The method of trial followed by the Trial Court seems to be fully authorized by Section 344-a of the Civil Practice Act of the State of New York, adopted in 1943, the validity of which was called in question by petitioner on the ground of its being violative of the Federal Constitution, and the judgment of the Courts of the State of New York is in favor of its validity, and the State Courts of New York have thereby decided a Federal question not theretofore decided by this Court.

5. The questions in issue are of great public importance, and much doubt has been expressed by the legal profession as to the constitutionality of Section 344-a of the New York State Civil Practice Act, which works a great departure from the long established forms of proof and trial which had come to be recognized as due process of law in cases where foreign law or the law of a sister state was invoked. A review of the questions presented by this Court will set at rest much doubt, and promote the orderly administration of justice.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, County of New York, commanding said Court to certify and send to this Court the complete transcript of the record of all proceedings in this case, to the end that such case may be reviewed and determined by this Court, as provided by law; and that the judgment of the said Supreme Court of the State of New York, County of New York, may be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

Dated: January 30th, 1948.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

MILTON DUNN, ESQ.,
Solicitor for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The grounds upon which the jurisdiction of this Court is invoked, the reports of the case (no opinions) in the Courts below, and the questions presented, are stated in the accompanying petition and are not here repeated.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

POINT I.

THE TRIAL COURT'S REJECTION OF THE COMMON LAW RULES AS TO THE REASONABLE CARE REQUIRED OF A RAILROAD AT PUBLIC CROSSINGS, UPON WHICH PETITIONER, THE PLAINTIFF BELOW, RELIED, AND ITS DIRECTION OF A VERDICT FOR RESPONDENT, THE DEFENDANT BELOW, DISMISSING PETITIONER'S COMPLAINT UPON SUPPOSED PROPOSITIONS OF NEW JERSEY LAW FOUND BY IT (APPENDIX, pp. 29-32), WHICH WERE UNPLEADED AND AS TO WHICH THERE WAS NO PROOF OR SHOWING ON THE TRIAL, AND AS TO WHICH THE PETITIONER, THE PLAINTIFF BELOW, WAS NOT APPRISED DURING THE TRIAL AND HAD NO OPPORTUNITY TO BE HEARD THEREON, EITHER AS TO THE LAW OR FACTS, RESULTED IN THE DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED TO HIM BY THE FOURTEENTH

AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE RESULT IS THE SAME WHETHER OR NOT THE VIOLATION WAS AUTHORIZED BY SECTION 344-a OF THE CIVIL PRACTICE ACT OF THE STATE OF NEW YORK.

Under the law of New York State, as in all common law jurisdictions, the presumption is that the common law still prevails in all common law jurisdictions, and that the common law of such jurisdictions is the same as the common law in New York, and the petitioner, the plaintiff below, relied upon that presumption on the trial of his case (*Southworth* v. *Morgan,* 205 N Y. 293; *International Text Book Co.* v. *Connelly,* 206 N. Y. 188).

As stated in the petition, and as may be seen from the record herein, the petitioner adduced a great deal of evidence showing the physical conditions at or near the crossing, the visibility and obstructions to the view toward the west, from the crossing, and the testimony of witnesses which proved the failure of the respondent, the defendant below, to give timely warning by bell or whistle of the approach of the passenger train, in violation of its common law duty of reasonable care under the decisions of New York State and other common law jurisdictions, and which also proved the failure of respondent, the defendant below, to give continuous warning by bell or whistle of the approach of the passenger train, from a distance beginning 300 yards from the crossing and continuing until the engine had passed the crossing, as required by the New Jersey Bell or Whistle Statute, which is pleaded in the complaint and was proved on trial.

The facts proved also made out a case squarely within the rule of *Royal Indemnity Co.* v. *Long Island Railroad Co., supra,* where it is held to be negligence for a railroad to run a fast train over a crossing while the automatic signals are already being activated by another train and give no warning of the approach of the second train.

The respondent, the defendant below, failed to plead any propositions of New Jersey law, and there was no proof or showing on the trial as to the New Jersey law or that it was different from the law in New York State, but at the end of the whole case, the Trial Court directed a verdict dismissing the petitioner's complaint on certain findings or propositions purporting to be based on New Jersey law, but as to which the petitioner had not been apprised on the trial and had no previous notice, and had no opportunity to be heard on the law or facts (Appendix, pp. 29-32).

The pronouncing of judgment against petitioner, on such propositions, without notice or the opportunity to be heard, constituted a clear denial of due process of law in violation of petitioner's rights guaranteed by the Fourteenth Amendment of the Federal Constitution.

It has been frequently repeated that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights (*Stuart* v. *Palmer*, 74 N. Y. 183), and undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights (*Westervelt* v. *Gregg*, 12 N. Y. 209).

Under the established forms of law and practice in New York State, prior to the adoption of Section 344-a of the Civil Practice Act in 1943, foreign law or the law of a sister state invoked as a bar, or in avoidance of plaintiff's cause of action, was a matter of special plea, to be pleaded and proved, with an opportunity to the plaintiff to be heard thereon both as to the law and facts, and to offer evidence in reply thereto (*Schweitzer* v. *Hamburg-Amerikanische P. A. G.*, 149 App. Div. 900, 134 N. Y. Supp. 812).

If in any case a defendant pleaded some proposition of foreign law or of a sister state as a defense to a plaintiff's cause of action, and if after proof by defendant of the proposition of foreign law, the Court refused to hear the plaintiff on the law or to give him an opportunity to offer evidence in

reply and avoidance, the denial of due process would be clear and this Court would not hesitate to so hold.

The denial of due process of law was a great deal more flagrant in the case at bar. Here, there was no notice at all that purported propositions of New Jersey law were even being considered. The same were not pleaded and were not proved, and no showing thereof was made on the trial, and petitioner, the plaintiff below, did not even have the opportunity to ask for a hearing thereon, and for all that appears in the record, it may be that while petitioner was still struggling to prove his case on the theories relied on by him, his case had already been decided against him on purported propositions of New Jersey law of which he had no notice.

The requirements of due process, the opportunity to a full and fair hearing and the right to be heard on every proposition of fact and law involved, are too well known by this Court to require elaborate discussion. (*Postal Tel. & Cable Co.* v. *Newport,* 247 U. S. 464, 62 L. ed. 1215; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 23 L. ed 914, 915; *Louisville & N R. Co.* v. *Schmidt,* 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; *Simon* v. *Craft,* 182 U .S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836; *Pennoyer* v. *Neff,* 95 U. S. 714, 733, 24 L. ed. 565, 572; *Scott* v. *McNeal,* 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 423, 59 L. ed. 1027, 1031, 35 Sup. Ct. Rep. 625.)

The method adopted by the Trial Court seems to be in full accord with and to be authorized by Section 344-a of the New York State Civil Practice Act, adopted in 1943, but the denial of due process is equally clear whether the result is accomplished by the judiciary or the legislature. In the latter case, the statute itself would be unconstitutional.

As was stated by Mr. Justice Brandeis, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 74 L. ed. 1107:

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious. Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First Nat. Bank v. Weld County, 264 U. S. 450, 68 L. ed. 784, 44 Sup. Ct. Rep. 385), state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

Even if the judgment could be justified on the merits it would not obviate the requirement of due process of law, and as was said in *Union Pacific Ry. Co.* v. *Syas*, 8 Cir. F. 561, "But no judgment is just, if not obtained by due process of law." (See also *Tunney* v. *Ohio*, 273 U. S. 535, 71 L. ed. 749; *Jordan* v. *Mass.*, 225 U. S. 167, 56 L. ed. 1038.)

But the judgment dismissing petitioner's causes of action on the merits is not justified on the merits, and the findings of the Trial Court (Appendix, pp. 29-32) are unsupported by the evidence and find no basis in law.

It is impossible to say what the Court intended by the first proposition of the findings, to the effect that respondent, the defendant below, had complied with the requirement of every New Jersey statute with reference to crossings and the operation of trains approaching and crossing grade crossings. It does not appear what particular statutes are referred to or what was required thereby and what was done in compliance therewith.

There was more than ample evidence for the jury as to the failure to give timely warning by bell or whistle of the approach of the passenger train, and the Court was without authority to find as a fact that proper and adequate warning had been given, and it becomes apparent from the next prop-

osition of the findings, as to obstruction to vision and that they did not render the highway so dangerous as not to be used in safety, even if the bell or whistle signals had not been given, that he intended to hold that such signals were unnecessary. This, of course, would be erroneous.

The rule of law which the Court intended to refer to in connection with obstructions to vision, was apparently the doctrine expressed in *Matthews* v. *Pennsylvania,* 7 Vroom, 531, 534, which is a special rule of liability in New Jersey, and which has nothing to do with the common law rule of ordinary care. The rule there expressed imposes upon the railroad a duty above the ordinary care of the common law under the conditions there mentioned.

The true rule, as expressed in that case, is that if a railroad itself creates extra hazard at a crossing by the curve or position of its road and by buildings, installations, or other obstructions upon its right of way, that it thereby assumes the duty of extra precautions, and the test of such extra danger is whether the crossing can still be used in safety, with ordinary care, if the statutory signals are given (*Kyle* v. *Lehigh Valley,* 81 N. J. L. 186), and not "even if the statutory signals had not been given." The giving of the statutory signals is never excused.

Nor is the duty of extra precautions limited to dangers created by the construction of the road or buildings, as stated by the Court (fol. 723), but applies to all obstructions regularly maintained on the right of way, such as telegraph poles, heaps of ballast, brush, railroad ties, and even freight cars, it fairly regularly maintained there (*Dando* v. *Director General,* 94 N. J. L. 285.)

The finding (fols. 724-725) that, even assuming that there were limitations to vision, as testified to by petitioner, the same were not due to the extra hazardous character of the crossing, such as would impose upon the respondent a duty of extra precautions, is a finding of fact which the jury alone could make, because the testimony of the petitioner was that the obstructions were due to the telegraph poles

and the rubble on the right of way and the angle at which the railroad crossed the highway, which restricted the view of the traveler on the highway to what could be seen between the first and second telegraph poles, the latter being only 120 feet west of the crossing (fols. 327, 331, 424, 425, 426).

The Court then proceeds to reject the rule of *Royal Indemnity* v. *Long Island R. R. Co., supra,* and *Maiorano* v. *Long Island Railroad, supra,* where the Court of Appeals reversed a judgment of dismissal, and other cases in New York State, upon which the petitioner relied, upon the sole authority of *Di Giendemonica* v. *Pennsylvania-Reading Seashore Lines,* 123 N. J. L. 296, which he holds as authority for a finding of absence of negligence on the part of the respondent and for a holding of contributory negligence, as matter of law, on the part of decedent, Kathryn Jongebloed, and as in effect proving that the common law no longer prevails in New Jersey.

The case is not in point at all and the facts are not even remotely similar to the facts in the Long Island case relied on, but petitioner had no opportunity to be heard thereon.

Moreover, the common law duty of the use of reasonable care at crossings by a railroad still prevails in New Jersey (*Rafferty* v. *Erie Railroad Company,* 66 N. J. L. 444; *Taylor* v. *Lehigh Valley R. R. Co.,* 87 N. J. L. 673; *Passarelo* v. *West Jersey & Seashore Railroad Company,* 98 N. J. L. 790; *Johnson* v. *Central Railroad Company,* 109 Atl. 359). The latter case involved the proper operation of a signal bell at a crossing which had been voluntarily installed by the railroad company, and the Court there held that the railroad was under a common law duty of care touching the proper operation of such bell.

Apparently on the proposition that it might be wrong in its propositions of law as to the absence of defendant's negligence, the Court finds contributory negligence on the part of decedent Kathryn Jongebloed, as matter of law, and he holds that because of such contributory negligence, it would

be his duty to set aside a verdict for plaintiff, and he thereby imputes the contributory negligence of decedent, Kathryn Jongebloed, to her deceased infant children.

This is erroneous. The contributory negligence of decedent, Kathryn Jongebloed, was for the jury under the law and facts. Moreover, the contributory negligence of the decedent, Kathryn Jongebloed, was not imputable to the deceased infants, either under New York or New Jersey law (*Newman* v. *Railroad Co.*, 52 N. J. L. 446, 19 Atl. 1102; New York Domestic Relations Law, Section 73), and would not authorize dismissal of the causes of action for their deaths.

There has been a complete denial of due process of law, and such denial has resulted in great injustice to petitioner and the unlawful dismissal of his causes of action.

POINT II.

THE CONSTITUTIONAL QUESTIONS OF THE DENIAL TO PETITIONER OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION, AND THE UNCONSTITUTIONALITY OF SECTION 344-a OF THE CIVIL PRACTICE ACT OF THE STATE OF NEW YORK, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION, WERE PRESENTED FOR DECISION TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND ITS JUDGMENT AFFIRMING THE ORDER AND JUDGMENT APPEALED FROM COULD NOT HAVE BEEN GIVEN WITHOUT DECIDING THE CONSTITUTIONAL QUESTIONS THUS PRESENTED.

The judgment entered upon the directed verdict of the Trial Court dismissing petitioner's complaint was affirmed by the Appellate Division of the Supreme Court of the State of New York, First Department, without opinion, and the affirmance by the Court of Appeals of the order

and judgment of the said Appellate Division was also without opinion.

The constitutional questions of due process of law and the unconstitutionality of Section 344-a of the Civil Practice Act of the State of New York, were presented to the Court of Appeals of the State of New York for decision, as appears from briefs filed by petitioner upon such appeal, copies of which will be presented as exhibits with the petition for certiorari herein.

The evidence in the record was such that the Court of Appeals of the State of New York could not have affirmed the judgment dismissing petitioner's complaint without deciding the Federal Constitutional questions presented by petitioner, adversely to petitioner's contentions (*Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 82 L. Ed. 751; *Interstate Amusement Company* v. *Albert,* 239 U. S. 560, 60 L. Ed. 439; *Postal Tel.* v. *Newport, supra*).

It must be borne in mind that the appeal to the Court of Appeals was from a directed verdict dismissing the complaint and not from the verdict of a jury on the facts, and that upon an appeal to the Court of Appeals from a directed verdict dismissing the complaint, the petitioner is entitled to assume the establishment of every issue upon which he relies concerning which there is some evidence, and that he is entitled to the most favorable inferences from the evidence (*African Metals Corporation* v. *Bullowa,* 288 N. Y. 78).

The petitioner's evidence was more than sufficient to take the petitioner's case to the jury on the question of respondent's negligence in failing to give timely warning by bell or whistle of the approach of the passenger train to the crossing under the rules of common law, and more than sufficient to prove respondent's failure to give such warning in compliance with the New Jersey Bell or Whistle Statute, and the evidence was also sufficient to prove respondent's negligence in operating a fast passenger train over the crossing, on a murky January afternoon near sunset, at a dis-

tance of only 400 or 500 feet behind a long freight train, with the automatic crossing signals being activated by the freight train and giving no warning of the approach of the passenger train, under the rule of *Royal Indemnity* v. *Long Island Railroad, supra,* not to mention numerous other elements of negligence shown by the proofs.

The situation in the case at bar was one of much greater danger than that in the Long Island case. Here, as in that case, the crossing was unprotected by flagman or gates (fol. 294), and here, as in that case, the situation at the time of the accident was not unusual, but was a usual one (fols. 362, 366, 386). This is not questioned by the respondent, who argued below that that was good railroading practice and was the purpose of having four tracks. The fact that in the case at bar the automatic signals worked a bell as well as flashing a light, whereas in the Long Island case the signals consisted of lights only, is of no significance, because the lights and bell worked as one and not independently, and when activated, were equally impotent to warn of the approach of a second train.

In the case at bar, the signal post on the south of the tracks, the direction from which the petitioner approached, was in such a position because of the angle at which the tracks crossed the highway, that the lights could not be seen at all as one neared the tracks (fols. 294-297, 526-532).

The fact that the signals were activated by a long freight train moving over the crossing on the second track, and that the passenger train, moving at the rate of 50 miles per hour, followed it over the crossing on the first track, at a distance of only 400 or 500 feet, created a much more dangerous condition than that in the Long Island case, where the train which had activated the signals was standing. One waiting at the crossing for a freight train to pass would almost instinctively take the passing of the rear of the freight train as a signal that it was safe to proceed.

The witnesses Corbett and Moore, who were in the other automobile at the crossing, did not hear the whistle of the

passenger train and were not even aware of its approach until the crash. The testimony of plaintiff's witnesses in the *Royal Indemnity* v. *Long Island* case was to the same effect, although, in that case, as appears from the printed record, there was proof by defendant's witnesses that the whistle had been blown, and it was not disputed that the same might have been blown.

The petitioner was entitled to go to the jury on that theory of defendant's negligence, and the Court of Appeals would have had to reverse the judgment and the Court of Appeals could not have affirmed the judgment, without passing upon the constitutional questions and overruling petitioner's contentions with reference thereto and approving the findings of the Trial Court rejecting the rule of the Long Island case as law in the State of New Jersey, and approving the action of the Trial Court in making findings as to the New Jersey law without proof or showing.

The petitioner was also entitled to go to the jury on the question as to the failure of the passenger train to give timely warning of its approach by bell or whistle under the common law, and also as to the failure of the passenger train to give such warning signals in the time and manner required by the New Jersey Bell or Whistle Statute.

The testimony of the witnesses Corbett and Moore, who were at the scene of the accident and who saw and heard all that transpired and described the accident in detail, that they did not hear the whistle or bell of the passenger train is "positive" and not "negative" testimony, and the same is true of the testimony of the witness Langla, who described affirmatively what he saw and heard and who testified that he heard the rumble of a train and one long blast of a whistle (*Brown* v. *New York Central*, 87 App. Div. 206, 83 N. Y. Supp. 1028, aff'd 179 N. Y. 582; *Schuster* v. *Erie R. R.*, 145 App. Div. 71, 129 N. Y. Supp. 262, aff'd 205 N. Y. 569; *Greaney* v. *Long Island*, 101 N. Y. 419).

But, even negative testimony will carry the case to the jury where there is no positive credible testimony that the

bell was rung or the whistle blown (*Foley* v. *New York Central*, 197 N. Y. 430; *Henavie* v. *New York Central*, 166 N. Y. 280).

And the testimony of the engineer and fireman is not the positive, affirmative credible testimony sufficient to overcome purely negative testimony, since they are deemed to be interested witnesses, and the jury is at liberty to disregard their testimony (*Greaney* v. *Long Island, supra; Schuster* v. *Erie Railroad, supra; Clancy* v. *New York, N. H. & H. R. Co.*, 128 App. Div. 141, 112 N. Y. Supp. 541).

Nor is any unfavorable testimony of the engineer and fireman binding upon the petitioner merely because he took their depositions and read them on the trial, as defendant has argued on the former appeals. In *Clancy* v. *New York, N. H. & H. R. Co., supra*, the Court said:

> "As the case is to be tried over, it is not amiss to say that the instruction to the jury at the defendant's request that the plaintiff was bound by the testimony of the engineer of the train for the reason that it called and examined him as a witness was erroneous. A jury or court is not obliged to accept the evidence of a witness as true against a party for the reason that he was that party's witness. There is no such rule. The jury or court is free to discredit his evidence whoever called him. A trial is a search for the truth. A party is only bound by evidence which is found to be true, whether of his own witnesses or the other party's witnesses."

The respondent sought to nullify the testimony of petitioner's witnesses as to non-compliance with the statute, by contending that the testimony was as to the whistle only and that there was no evidence as to the non-ringing of the bell.

This objection was not well taken. While the witnesses Corbett and Moore testified definitely that they did not hear the whistle, their testimony was that they did not hear the passenger train at all, and were not aware of its

approach until the crash. This is convincing proof that they did not hear the bell.

The statement of the witness Moore had been taken by the respondent after the accident, and her testimony on the trial, in answer to a question by respondent's counsel, that it was possible for the bell to have been rung and the whistle blown without her hearing them, is evidence that she heard neither bell or whistle (*Whitaker* v. *Staten Island Midland R. Co.*, 72 App. Div. 468, 76 N. Y. Supp. 548).

The testimony of the witness Langla likewise furnishes proof that the bell was not rung. He was in a position to hear and he described all that he heard, the rumble of a train and one long blast of a whistle at the time he became aware of the accident. He apparently did not hear the bell.

Moreover, the testimony of the engineer was that he rang the bell and blew the whistle simultaneously, and he thereby ties the bell and whistle together, and if the evidence is sufficient for a finding by the jury that the whistle was not blown timely or in compliance with the New Jersey statute, it also warrants a finding that the bell was not so rung. This is the utterance of the Court of Errors and Appeals of New Jersey in *Ackerley* v. *Pennsylvania Railroad Company*, 130 N. J. L. 292.

It should be noted that the State of New Jersey has adopted the New York rule and decisions on this subject.

The agreement of the witnesses Corbett and Moore to the suggestion of counsel that the bell and whistle might have been sounded without their having heard them, has no bearing on the value of the testimony as to what the witnesses saw and heard, this being for the jury (*Renwick* v. *New York Central*, 36 N. Y. 132).

Moreover, the testimony of the engineer and fireman as to the sounding of three or four blasts of the whistle, and that the same were one second apart, alone furnishes conclusive evidence that the duration of the sounding of the whistle was insufficient to comply with the New Jersey statute (*Palumbo* v. *Pennsylvania R. R. Co.*, 159 A. 322), and was not timely

warning under the common law (*Flynn* v. *Long Island*, 289 N. Y. 283).

The failure of the respondent to call the other three members of the train crew to testify as to the ringing of the bell or blowing of the whistle, furnishes a strong inference that their testimony would have been unfavorable.

This evidence was more than sufficient for the jury under the common law, and the Court of Appeals would have been required to reverse the judgment, and it could not affirm the judgment without passing upon the constitutional questions and deciding them adversely to the petitioner, and approving the findings of the Trial Court and approving its action in making such findings without proof or showing and without notice to petitioner and without any opportunity to be heard.

It is clear that by its affirmance of the judgment appealed from, the Court of Appeals of the State of New York has denied petitioner's claim of right to due process of law under the Fourteenth Amendment of the Federal Constitution, and has also decided in favor of the validity of Section 344-a of the Civil Practice Act of the State of New York, the validity of which was called in question on the ground that the same was repugnant to the Fourteenth Amendment of the Federal Constitution.

CONCLUSION.

It is submitted that a writ of certiorari should be granted as prayed for in the petition, and that this Court should review the judgment appealed from and reverse the same.

Dated: January 30th, 1948.

Respectfully submitted,

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

APPENDIX.

Findings of the Trial Court.

In directing the verdict for defendant, dismissing the complaint (fols. 722-729), the Trial Court made a decision or findings, as follows:

DECISION OR FINDINGS OF THE TRIAL COURT.

The Court: The undisputed evidence in this case permits of only one conclusion: that the defendant railroad complied fully with every New Jersey statute regulating the maintenance of grade crossings and the operation of trains approaching and crossing such grade crossings.

This finding is established by the evidence of witnesses called by the plaintiff and by the depositions read into evidence by the plaintiff, after giving to such evidence the inferences most favorable to the plaintiff. Furthermore, I hold that assuming there were some obstructions to vision which had been created by the railroad company, they had not rendered the use of the public road so dangerous that persons of ordinary prudence could not have used it in safety even if the statutory signals had not been given. See in this regard *Kyle* v. *Lehigh Valley Railroad Co.*, 81 N. J. L. 186; *Horandt* v. *Central Railroad Co. of N. J.*, 78 N. J. L. 190; *Tota* v. *Pennsylvania Railroad Co.*, 140 Atlantic Reporter 671.

The duty to take precautions additional to those required under the statute arose only when the dangerous features were permanent and were the consequences of the acts of the railroad itself in constructing its roads or buildings. See *Swenson* v. *Delaware, Lackawanna & Western Railroad Co.*, 99 N. J. L. 403. This is the law of a sister state, the State of New Jersey, and, being substantive law, it is binding upon this Court.

Assuming arguendo the somewhat incredible testimony of the plaintiff himself as to the distances at which objects

might be seen on the track to the west of the crossing, I find that such limitation of vision, if any, did not result from any extra hazardous character of the crossing such as would impose a duty upon the railroad to exercise extra precautions.

As to any relaxation of the standards of care imposed upon the decedent driver of the car because of the fact that while the warning signals persisted there was no change in their character after the freight train passed the crossing, that contention of the plaintiff is destroyed by the holding in *Giendemonica* v. *Pennsylvania-Reading Seashore Lines*, 123 N. J. L. 296. This case is not only authority for a finding of contributory negligence on the part of the decedent driver of the car, holding, as it does, that alleged consistent usage by the defendant cannot be substituted for proof of the exercise of due care at a place of known danger, but it also holds that such custom or usage does not constitute a situation from which negligence may be inferred in connection with this specific accident.

Furthermore, factually the evidence preponderates to such an extent towards a finding of contributory negligence on the part of the decedent driver and towards exculpation of the defendant from negligence that were the jury to bring in a verdict for the plaintiff I would be constrained to set it aside. For example, the observation by Mrs. Corbett, the plaintiff's witness, that the plaintiff's car seemed to stall and that the accident could have been avoided by reversing or going forward is quite persuasive. Then from the geography of the scene of the accident it seems incredible that there was not an unobstructed view of the locomotive from the point where the plaintiff's car was stationed for a distance of well over five hundred feet, which was the space separating the two trains.

Accordingly, and with great reluctance in view of the nature of the case, in view of the latitudes allowed in this State in death actions, and in view of the heroic efforts of plaintiff's

counsel, I am constrained to grant the motion for a direction of the verdict and to dismiss the complaint.

(The Clerk of the Court thereupon directed the jury to bring in a verdict for the defendant.)

The Court: The jury is discharged with the thanks of the Court.

Mr. Beaudry: May I note my appropriate exceptions and may I have a thirty-day stay and sixty days to make a case?

The Court: Thirty and sixty days.

Statute Involved.

SECTION 344-A OF THE CIVIL PRACTICE ACT OF THE STATE OF NEW YORK.

Section 344-a. Judicial notice of matters of law. A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law:

1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof.

2. A private act, or resolve of the legislature of this state, or of the Congress of the United States.

3. An ordinance, resolution, by-law, rule or proceeding of the appropriate governing body of any city, county, town or village within this state.

4. A rule or regulation of an executive department, public board, agency or officer of this state, or of a city, county, town or village thereof.

5. A rule or regulation of an executive department of the government of the United States, or a public board, agency or officer created by the law thereof.

B. Whether a matter of law is judicially noticed pursuant to this section, or formal proof thereof is taken pursuant to other sections of this act, such law shall be determined by the court or referee and included in its findings, or charged to the jury as the case may be. Such finding or charge shall be subject to review on appeal and shall be known and otherwise treated as a finding or charge on a matter of law.

C. Whether a matter of law specified in this section is judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research.

D. The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof. (Added L. 1943, ch. 536, in effect Sept. 1.)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947.

No. 565.

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of KATHRYN JONGEBLOED, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of ROBERT JONGEBLOED, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of ELAINE JONGEBLOED, deceased,

Petitioner,

—against—

ERIE RAILROAD COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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STATEMENT.

If the brief of respondent, Erie Railroad Company, in opposition to the petition for certiorari herein, has succeeded in proving anything at all, it proves petitioner's contention

that he has been denied a fair trial according to the established forms which had come to be recognized as the minimum requirements of due process of law, under both the Federal Constitution and the Constitution of the State of New York.

Respondent's argument, at page "11" of its brief, apparently concedes that the record of the proceedings on the trial is wholly devoid of evidence or proof, or of any showing or notice of any kind, apprising the petitioner of any purported propositions of New Jersey law under consideration by the Trial Court, and that such omission would amount to a failure of due process of law unless the requirements of due process were otherwise satisfied or excused.

It seems to be respondent's contention on this proceeding that the failure of due process of law disclosed by the record can be overcome by the unsupported and unsworn statements in its counsel's brief, that Mr. Beaudry, petitioner's attorney, was apprised of all the questions of law being considered by the Trial Court. This is a unique and dangerous contention, and, if such practice were ever recognized, would permit adjudications affecting life, liberty and property without evidence, and allow the same to be sustained on review by mere assertions of counsel tending to show waiver or excuse of the omission or failure.

It also seems to be respondent's contention that whereas the failure to apprise a party on trial of the questions to be tried might constitute a denial of due process on a trial before some judges, that the same rule does not prevail where the Trial Judge is distinguished and respected, and that in the latter situation the same failure or omission would not amount to a denial of due process, and that it would be "a matter of serious concern," apparently resulting in unpleasant consequences, for the offended party to charge that he had been deprived of a fair trial.

Criticism of the method of trial as violative of due process of law involves no reflection upon the integrity of the Trial

Justice, and petitioner's objections to the manner of trial were taken in good faith to protect rights guaranteed to the petitioner by the Federal Constitution, and without any intent on the part of petitioner or his attorney of being disrespectful to the Trial Justice, and the petitioner cannot permit the respondent or its counsel to treat him as a wrongdoer, unworthy of the consideration of this Court, because he has invoked its aid to protect his constitutional rights.

An examination of the record will demonstrate that the petitioner herein made out, on trial, an unusually strong case of common law negligence against the respondent railroad company, entitling the petitioner to take his case to the jury; that the Trial Justice, who is conceded by respondent to be most distinguished and respected, took the same view of petitioner's case seems to be shown by the fact that if petitioner, as plaintiff below, had failed to prove a case under the common law, a verdict could have been directed against the petitioner, the plaintiff below, on that ground, and it would not have been necessary for the Trial Court to make findings on propositions of New Jersey law adopted by him (R. pp. 241-243).

We are also assured from the known learning and prestige of the Trial Justice, that in making the findings on propositions of New Jersey law, which he charged to the jury in directing a verdict dismissing petitioner's complaint below (R. pp. 241-243), without proof or showing on the trial as to the New Jersey law, that the Trial Court acted under the authority of Section 344-a of the Civil Practice Act of the State of New York, this being the only statute in New York State purporting to authorize such action by the Trial Court.

POINT I.

THE ASSERTED FEDERAL QUESTIONS ARE MOST SUBSTANTIAL AND AFFECT THE MOST FUNDAMENTAL PRINCIPLES OF WHAT WE HAVE COME TO UNDERSTAND AS DUE PROCESS OF LAW.

Respondent's attempts to avoid the Federal question lead it into specious argument which wholly loses sight of reality.

If we examine the record in this case and review the course of the trial as something not abstract, but real, happening within our own experience, we become suddenly aware that the result is a shocking denial of justice.

We see the petitioner, the plaintiff below, suing for the tragic deaths of his wife, a son and a daughter, upon well defined recognized grounds of defendant's liability, proving his case under the common law, which was presumed to be the common law of New Jersey and the only law presumed to be known to the Court, and we see petitioner, despite great difficulties and relentless opposition, patiently presenting and developing his proofs and, by great and unremitting perseverence, establishing an unanswerable case of defendant's negligence, entitling the petitioner to recover for the deaths of his wife and children.

But with all the evidence in and the case closed, the petitioner is awakened from his dream, the trial and the great case of negligence which he established was only a mockery, and he learns for the first time that his case is to be tested and dismissed on propositions of law, or some strange system of law, evolved by the Court, by its own independent study and research of New Jersey law, as to which petitioner was not apprised during the trial and had no opportunity to be heard (R. pp. 241-243).

This was in absolute derogation of the established practice with reference to the proof of foreign law and the right to be heard thereon, which had been always followed in New York State and which had become recognized as essential to due process of law.

Due process of law is guaranteed by the Fourteenth Amendment of the Federal Constitution, and we are at a loss to determine by what course of reasoning the respondent arrives at the conclusion that the Federal question presented is not a substantial one.

There seems to be little merit to respondent's contention that a mere error of law is involved and that the question of due process is not presented.

Section 344-a of the New York State Civil Practice Act, set out at pages 31-32 of the petition and brief, is clear and simple in wording and needs no construction, and if we examine it and match up the method followed by the Trial Court, in the case at bar, in handling the foreign law, with the different provisions of the statute, we can readily see that the practice followed by the Trial Court complies with the statute and is now the established practice in New York State.

It is clear, then, that the Trial Court committed no error of law, but followed the practice established by statute in New York State.

But even an error of law may amount to violation of the due process clause of the Fourteenth Amendment, as pointed out by Mr. Justice Brandeis, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, cited in petitioner's petition and brief at pages 18 and 19.

Nor is the statute, Section 344-a of the New York State Civil Practice Act, a mere rule of evidence, as contended by respondent. True, there are no vested rights in rules of evidence, and such rules may be changed by the Legislature almost at will, subject, of course, to the limitation that denial of due process of law does not result.

A new rule of evidence, altogether dispensing with evidence or proof and resulting in the denial of the right to be heard, would constitute denial of due process of law and be unconstitutional.

There lies the trouble with Section 344-a of the Civil Practice Act of the State of New York. The statute dispenses with proof of the foreign law, and results in the denial of the right to be heard and of due process of law.

POINT II.

THE COURT HAS JURISDICTION TO REVIEW THIS CASE. THE FEDERAL QUESTIONS WERE PROPERLY RAISED IN THE NEW YORK COURTS AND WERE NECESSARILY PASSED UPON BY THE NEW YORK COURTS.

The proceedings on the trial of the case at bar and petitioner's subsequent efforts to obtain a review of his case and the opposition encountered, are more eloquent than any words which could be borrowed from any reported cases to demonstrate the absolute repudiation by Section 344-a of the Civil Practice Act of the State of New York, and the practice established thereby, of all the processes of law which had come to be recognized as essential to due process of law under the Constitution of the State of New York and the Fourteenth Amendment of the Federal Constitution.

In the case at bar, the petitioner, the plaintiff below, was not apprised of the propositions of foreign law which were being considered by the Trial Court, and an opportunity given to him to be heard. Not only that, but he was not even apprised that propositions of foreign law were being considered and that the Court intended to dispose of his case on propositions of foreign law, without giving him an opportunity to be heard, and he had no means of knowing that his constitutional rights were being violated, and he had no opportunity to raise constitutional questions on the trial.

However, when the petitioner raised the question of the constitutionality of Section 344-a of the Civil Practice Act of the State of New York, in the Appellate Division of the Supreme Court, which was his first opportunity, the respondent argued, and apparently successfully, that the Appellate Division had no authority to pass upon a constitutional question which had not been raised in the Trial Court.

Throughout the numerous proceedings in this case, the respondent, in its counsel's briefs, has regularly resorted to the practice of arguing facts not appearing in the record,

and its versions of the facts presented in its briefs have not always been accurate or complete and have never rendered complete justice to the opposition.

In respondent's brief in opposition to this application, the statement is made that in raising the question of the constitutionality of Section 344-a in the Appellate Division of the Supreme Court, that petitioner did not raise the question of due process of law, and excerpts from petitioner's briefs in the Appellate Division are included in the appendix to respondent's brief.

The respondent entirely omits to mention that on a motion in the Appellate Division of the Supreme Court, for leave to appeal to the Court of Appeals, that the petitioner, in his arguments as to the constitutionality of Section 344-a of the Civil Practice Act, argues the denial of due process of law and, therefore, the fact is that all constitutional questions were raised in the very first Court in which the same could have been raised.

But this becomes immaterial in view of the fact that the same arguments were made by respondent in the Court of Appeals on respondent's motion to dismiss petitioner's appeal to that Court, taken on constitutional grounds (*Jongebloed* v. *Erie*, 296 N. Y. 12, 72 N. E. (2d) 627).

The Court of Appeals having denied respondent's motion to dismiss petitioner's appeal to that Court, held petitioner's pending motion to that Court for leave to appeal to be unnecessary, and denied the same on the ground that the appeal lay as matter of right, on April 17th, 1947. The memorandum decision appears at 296 N. Y. 994, 73 N. E. (2d) 570, and reads as follows:

> "The plaintiff argued that the directed verdict on propositions of New Jersey law as to which there was no proof and no showing during trial and as to which plaintiff was not apprised during trial and was given no opportunity to be heard on the law or to present facts and evidence material to such propositions, constituted a denial of due process of law in violation of

> article 1, section 6, of the state Constitution and of the Fourteenth Amendment of the Federal Constitution, and of the right to trial by jury guaranteed by article 1, section 2, of the state Constitution. The defendant claimed that section 344-a of the Civil Practice Act was constitutional, and that the trial court properly directed a verdict for defendant and dismissed the complaint."

The statements in respondent's brief as to what occurred in the Court of Appeals on the argument of the petitioner's appeal in that Court, are in error and convey an erroneous impression.

The argument in the Court of Appeals was devoted almost entirely to the question of due process of law, and when respondent's counsel attempted to argue that the constitutional question should be limited to the constitutionality of Section 344-a of the Civil Practice Act, and that the question of due process of law was not otherwise involved, he was definitely and firmly overruled by Chief Judge Loughran, who held that due process of law and all the constitutional questions raised by petitioner, the appellant, were properly before the Court.

The report of the decision in that Court, reported at 297 N. Y. 534, 74 N. E. (2d) 470, shows the questions involved to be as follows:

> "The plaintiff argued that the directed verdict on propositions of New Jersey law as to which there was no proof and no showing during trial and as to which plaintiff was not apprised during trial and was given no opportunity to be heard on the law or to present facts and evidence material to such propositions, constituted a denial of due process of law in violation of article 1, section 6, of the state Constitution and of the Fourteenth Amendment of the Federal Constitution, and of the right to trial by jury guaranteed by

article 1, section 2, of the state Constitution. The defendant claimed that section 344-a of the Civil Practice Act was constitutional, and that the trial court properly directed a verdict for defendant and dismissed the complaint."

The appellant's briefs in the Appellate Division were not offered by the respondent in the Court of Appeals for the purpose of limiting the constitutional questions before the Court of Appeals, but they were offered by respondent's counsel for the purpose of trying to show from the arguments made in petitioner's briefs in the Appellate Division, that petitioner had been fully apprised on the trial as to the questions being considered by the Trial Court, and the method of trial to be followed, and that by failing to object, at that time, petitioner had lost the right to object or to raise constitutional questions.

It is such contentions of the respondent, in its briefs and on the argument in the Court of Appeals, which prompted the affidavit of petitioner's counsel, on the motion for reargument in the Court of Appeals, from which excerpts are set out in Appendix "B" of respondent's brief hereon.

The petitioner's briefs in the Appellate Division were not directed to be filed with the Clerk of the Court of Appeals by Chief Judge Loughran, as stated in the footnote at page "7" of respondent's brief.

Many off the record statements had been made in respondent's briefs, and Chief Judge Loughran had advised petitioner's counsel to disregard such statements and to confine himself to the record and that nothing not in the record would be considered, and when respondent's counsel offered to submit the petitioner's Appellate Division briefs, Chief Judge Loughran refused to receive them, and upon respondent's insistence that the same be received or that a motion would be made to amend the record in some form, Chief Judge Loughran impatiently suggested to respondent's counsel that he could hand them to Mr. Ludden, the Clerk of the Court, who was present in the courtroom, if he pleased.

Respondent's criticism that petitioner has not complied with the requirement of Rule 12, is not well taken. In the present case, the federal questions could not be raised by pleading, by request to charge, or by exception or assignments of error, and the manner in which the same were raised is fully set forth in the petition.

The federal questions were properly raised below and were recognized in the Court of Appeals as properly before that Court, and the same are properly before this Court.

CONCLUSION.

IT IS SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED AS PRAYED FOR IN THE PETITION.

Respectfully submitted,

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term 1947

No. 565

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Kathryn Jongebloed, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Robert Jongebloed, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Elaine Jongebloed, deceased,

Petitioner,

—against—

ERIE RAILROAD COMPANY,

Respondent.

BRIEF OF ERIE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term 1947

No. 565

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Kathryn Jongebloed, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Robert Jongebloed, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Elaine Jongebloed, deceased,

Petitioner,

—against—

ERIE RAILROAD COMPANY,

Respondent.

BRIEF OF ERIE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion by Mr. Justice Botein, rendered on January 17, 1946 at Trial Term, Part XVII, of the Supreme Court, New York County, directing a verdict in favor of the defendant and dismissing the complaint (R. 241-243), has not been reported. The unanimous affirmance without opinion by the Appellate Division, First Department (R.

309-312) is reported in 271 App. Div. 815 (November 8, 1946). The decision by the said Appellate Division denying the plaintiff's motion for leave to appeal to the Court of Appeals is reported in 271 App. Div. 926 (January 24, 1947). The opinion by the Court of Appeals denying the defendant's motion to dismiss the plaintiff's appeal taken as of right to that Court is reported in 296 N.Y. 912 (February 28, 1947). The decision by the Court of Appeals denying the plaintiff's motion for leave to appeal to that Court is reported in 296 N.Y. 994 (April 17, 1947). The unanimous affirmance without opinion by the Court of Appeals (R. 316-318) is reported in 297 N.Y. 534 (July 2, 1947). The decision by the Court of Appeals denying the plaintiff's motion for reargument (R. 320) is reported in 297 N.Y. 603 (October 2, 1947).

Jurisdiction

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended (28 U.S.C. 344[b]). The unanimous order of affirmance by the Court of Appeals was entered in that Court on July 2, 1947 (R. 316-317). The Court of Appeals denied the plaintiff's motion for reargument on October 2, 1947 (R. 320). The petition for a writ of certiorari was filed February 2, 1948, the time to file having been extended by order of Mr. Justice Jackson on December 31, 1947 (R. 321).

Grounds of Respondent's Opposition to the Petition

The respondent opposes the petition for certiorari on the following grounds:

1. The federal constitutional questions which the petition seeks to present (Pet. p. 12), not having been

raised at Trial Term or in the Appellate Division but having been raised in the Court of Appeals for the first time, were not considered or decided or necessary to the determination of the case by the Court of Appeals. Accordingly, this Court has no jurisdiction to entertain this case under Section 237(b) of the Judicial Code.

2. The federal constitutional questions which the petition seeks to raise under the due process clause of the Fourteenth Amendment (Pet. p. 12) are plainly lacking in substance, amounting to nothing more than the contention that the trial judge and twelve appellate judges of the State of New York who have weighed the plaintiff's case and have found it without merit, were in error.

ARGUMENT

POINT I

This Court has no jurisdiction to review this case, since the asserted federal questions were not properly raised in the New York courts and were not passed upon by the New York courts.

The petition seeks to present to this Court three alleged federal questions involving the due process clause of the Fourteenth Amendment of the Constitution of the United States. Two of the three questions involve the constitutionality of Section 344(a) of the New York Civil Practice Act, the assertion being that this statute, which authorizes the trial and appellate courts of New York, in their discretion, to take judicial notice of the statutory and decisional law of a sister state or of a foreign country, vio-

lates the due process clause of the Fourteenth Amendment. It is asserted (Pet. p. 10) that the validity of this statute was drawn into question below on the ground that it was repugnant to the Fourteenth Amendment, and it is claimed (Br. p. 23) that the federal constitutional questions were presented to the Court of Appeals and that Court could not have affirmed the judgment dismissing the complaint without deciding these questions adversely to the plaintiff.

The jurisdictional statement in the petition (Pet. pp. 10-11) is fatally defective, for it utterly fails to comply with Rule 12(1) of the Rules of this Court. The petition does not specify the stage in the proceedings in the trial or appellate courts of New York at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them is not stated. A conclusory statement is made that the validity of Section 344(a) of the New York Civil Practice Act was drawn into question as being repugnant to the Fourteenth Amendment of the Constitution of the United States, but no facts are stated in support of this conclusion. No quotation or record citation is made to show to this Court the manner in which the alleged federal questions were brought to the attention of, and decided by, the highest court of the State of New York. The petitioner completely fails to sustain the burden of showing that the rulings of the Court of Appeals "were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." The provisions of Rule 12(1) are, of course, mandatory when review of a state court judgment is sought by a petition for writ of certiorari.

The record certified to this Court is barren of any showing whatever of any federal constitutional question having been raised at any stage of the proceedings in the courts of New York. Neither the Appellate Division, First Depart-

ment (271 App. Div. 815) nor the Court of Appeals (297 N.Y. 534), in unanimously affirming the direction of a verdict and the dismissal of the complaint at Trial Term, wrote an opinion. The remittitur of the Court of Appeals (R. 316-317) gives no indication that federal constitutional questions were decided by that Court; and during a period of eight months since the affirmance of the judgment by the Court of Appeals the petitioner has made no effort to obtain an amendment by that Court of its remittitur (cf. *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52, 54 [1934]). Moreover, in the memorandum prepared by the Court of Appeals State Reporter (297 N.Y. 534, 535), there is no indication that any federal question was passed upon by the Court of Appeals.

It is essential to the jurisdiction of this Court in reviewing a decision of a state court that there must appear affirmatively from the record, not only that a federal question was presented for decision to the highest state court having jurisdiction, but that such question was considered, actually decided, and that its decision was necessary to the determination of the case. *Lynch* v. *New York ex rel Pierson, supra.* The burden is upon the petitioner to show affirmatively that this Court has jurisdiction. *Memphis Natural Gas Company* v. *Beeler,* 315 U.S. 649, 651 (1942) (and cases cited therein). Upon the record before this Court, the petitioner not only has utterly failed to sustain this burden, but it is clear that the Court of Appeals could not have passed on any federal question.

Although the plaintiff raised no constitutional question whatever at Trial Term, in his brief in the Appellate Division, First Department, the contention was made that Section 344(a) of the New York Civil Practice Act, in so far as it enables a court to take from a jury the determination of questions of foreign law, violated the plaintiff's

right to trial by jury of those questions, and therefore was unconstitutional under Article I, Section 2, of the Constitution of the State of New York.

After the unanimous affirmance by the Appellate Division of the judgment below (271 App. Div. 815), and after that court had denied the plaintiff's application for leave to appeal to the Court of Appeals (271 App. Div. 926), he filed a notice of appeal to the Court of Appeals as of right. The defendant promptly moved in the Court of Appeals to dismiss the appeal on the ground that the affirmance by the Appellate Division had been unanimous and neither the Appellate Division nor the Court of Appeals had granted permission to appeal. The Court of Appeals denied the defendant's motion, with the following memorandum decision (296 N.Y. 912):

> "Motion to dismiss appeal denied, with $10 costs. While no constitutional question was urged at the Trial Term, it is sufficient for our jurisdictional purposes that, as here, a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision."

The Court of Appeals thus made it clear that the one constitutional question involved in the appeal to that Court was the constitutional question which had been presented to the Appellate Division. In order to ascertain what constitutional question the plaintiff presented to the Appellate Division, it is necessary to look at the plaintiff's briefs in the Appellate Division where it will be found that he raised one constitutional question and only one, namely, whether Section 344(a) of the New York Civil Practice Act was repugnant to Article I, Section 2, of the Constitution of the State of New York which provides that "Trial by jury in

all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." The portions of the plaintiff's briefs in the Appellate Division which mentioned a constitutional question in any way are set forth in full in Appendix A, annexed to this brief.* Clearly, the plaintiff raised in the Appellate Division at most a constitutional question arising under the Constitution of the State of New York and this is the only question which the Court of Appeals conceivably could have considered. No federal constitutional question was raised in the Appellate Division and, therefore, under the rule announced by the Court of Appeals in this very case (296 N.Y. 912), no federal constitutional question was considered by the Court of Appeals.

The federal questions presented in the petition (Pet. p. 12) were raised for the first time in the plaintiff's Court of Appeals brief (pp. 19-29). Indeed, the petitioner here states (Br. p. 23) that copies of his Court of Appeals briefs will be presented to this Court as exhibits with the petition for certiorari to show that the federal constitutional questions were presented to the Court of Appeals for decision. It is thus apparent that the petitioner invokes the jurisdiction of this Court solely upon the ground of the alleged federal constitutional questions which concededly were raised for the first time in the Court of Appeals.

The fact that the petitioner first raised his alleged federal constitutional questions in the Court of Appeals precludes him from invoking this Court's jurisdiction under

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* The plaintiff's briefs in the Appellate Division were handed up to the Court of Appeals at the time of the argument in that Court and, at the direction of Chief Judge Loughran, were filed with the Clerk of that Court as part of the record in this case for the purpose of showing precisely what constitutional question had been presented in the Appellate Division.

Section 237(b) of the Judicial Code. That these questions were disregarded by the Court of Appeals is clear from an unbroken line of decisions in which that Court has refused to consider or pass upon constitutional questions not raised or presented for decision in the lower courts. *Vose* v. *Cockcroft,* 44 N.Y. 415, 424 (1871); *Delaney* v. *Brett,* 51 N.Y. 78, 81 (1872); *Purdy* v. *Erie Railroad Company,* 162 N.Y. 42, 50-51 (1900), writ of error dismissed 185 U.S. 148 (1902); *Dodge* v. *Cornelius,* 168 N.Y. 242, 245 (1901); *Fosdick* v. *Metal Shelter Company, Inc.,* 223 N.Y. 700 (1918), motion for rehearing granted 224 N.Y. 552 (1918); *Nod-Away Company Inc.* v. *Carroll,* 240 N.Y. 252, 253 (1925); *Dobrikin* v. *Union Railway Company,* 250 N.Y. 561 (1929); *Ridall* v. *Courson,* 252 N.Y. 592 (1929); *Matter of Yeannelis* v. *Menides,* 259 N.Y. 513 (1932); *Eddy* v. *Fidelity & Deposit Co.,* 265 N.Y. 276, 282 (1934). This doctrine is a corollary to the limited powers of review granted to the Court of Appeals under Article 6, Section 7, of the Constitution of the State of New York. Cf. *People* v. *Bresler,* 218 N.Y. 567 (1916). The settled rule of the Court of Appeals in this respect, of course, is binding upon this Court. *Purdy* v. *Erie Railroad Company,* 185 U.S. 148 (1902).

It follows that this Court lacks the power to review this case, for no federal question is presented by the record. It consistently has been held that where the highest state court under its settled rules of practice has refused to consider federal questions because they were not properly raised below, this Court has no jurisdiction. *Spies* v. *Illinois,* 123 U.S. 131, 181 (1887); *Erie Railroad Company* v. *Purdy,* 185 U.S. 148, 153-154 (1902); *Layton* v. *Missouri,* 187 U.S. 356, 361 (1902); *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906); *Cox* v. *Texas,* 202 U.S. 446 (1906); *Louisville & Nashville R.R. Co.* v. *Woodford,* 234 U.S. 46, 51 (1914); *Atlantic Coast Line R.R. Co.* v. *Mims,* 242 U.S. 532,

535(1917); *Missouri Pacific Ry. Co.* v. *Taber,* 244 U.S. 200, 201-202 (1917); *Dorrance* v. *Pennsylvania,* 287 U.S. 660 (1932); *Pennsylvania Railroad Co.* v. *Illinois Brick Co.,* 297 U.S. 447, 463 (1936); *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942); *Bailey* v. *Anderson,* 326 U.S. 203, 206-207 (1945).

POINT II

The asserted federal questions are not substantial.

The petition for certiorari and the brief in support thereof show upon their face that no substantial question of due process of law under the Fourteenth Amendment is presented here. In both the petition (pp. 2-6) and the brief (pp. 19-22, 23-28), long arguments are set forth in support of the petitioner's contention that the trial justice failed to give due weight to the evidence and acted arbitrarily in applying erroneous principles of law, and that the appellate courts of New York have sanctioned such error.

The petitioner has had the opportunity of presenting his case at a trial which occupied four days (R. 29). The trial court's determination was fully reviewed by two appellate courts in New York. Even if the thirteen state judges who have passed upon this case were, in their unanimous judgment, in error, still that would present no question of due process under the Fourteenth Amendment. It is well established that a merely erroneous decision rendered by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company* v. *Kentucky,* 273 U.S. 269, 273 (1927); *Bonner* v. *Gorman,* 213 U.S. 86, 91 (1909).

The due process clause of the Fourteenth Amendment does not give jurisdiction to this Court to review errors of law alleged to have been committed by state courts in the performance of their duties within the scope of their authority concerning matters non-federal in character. *McDonald* v. *Oregon Railroad and Navigation Co.*, 233 U.S. 665, 670 (1914); *Bell Telephone Company of Pennsylvania* v. *Pennsylvania Public Utility Commission*, 309 U.S. 30, 32 (1940); for the due process clause does not guarantee that the decisions of state courts shall be free from error. *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 299 (1937).

The petitioner states (Br. p. 18) that the method adopted by the trial court of taking judicial notice of the substantive law of New Jersey, the state in which the asserted causes of action arose, "seems to be in full accord with and to be authorized by Section 344(a) of the New York Civil Practice Act * * *." However, it is claimed that this statute enabled the trial court in this case to direct a verdict against the plaintiff upon propositions of foreign law of its own choosing not pleaded or proven,* without any notice to the plaintiff until the end of the trial, and without any opportunity offered to the plaintiff to be heard thereon. Such procedure by the trial court is claimed to have deprived the plaintiff of due process of law guaranteed by the Fourteenth Amendment. The petitioner's complaint of the conduct of the trial proceedings is stated in substantially identical language at pages 6 and 7 of the petition and at pages 17 and 18 of the supporting brief. The three questions presented by the petition are couched in similar language (Pet. p. 12).

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* The applicable New Jersey statutory and decisional law was pleaded (R. 6-10, 17-18). At the trial the plaintiff's attorney offered the applicable New Jersey statutes in evidence and the trial court stated that they would be "deemed in evidence" (R. 240).

To charge one of the most distinguished and highly respected justices of the Supreme Court of New York with having denied a litigant a fair trial and an opportunity to be heard on the merits of his case is a matter of serious concern. The charge comes with extraordinary ill grace in this Court because the plaintiff's attorney, Arthur A. Beaudry, Esq., in an affidavit sworn to September 23, 1947 and filed in the Court of Appeals in support of an application for leave to reargue the appeal in that Court, stated the substance of various discussions between the trial judge and Mr. Beaudry throughout the trial which show conclusively that he was fully apprised of the questions of law which the trial judge was considering and that he had every opportunity to brief and argue all questions of law raised on the trial. The portions of Mr. Beaudry's affidavit referred to are set forth as Appendix B, annexed to this brief.

Wholly apart from whether the plaintiff had ample opportunity in the trial court to be heard on the propositions of New Jersey law relied upon by that court, it is clear that no substantial question of due process of law is raised in this Court under the Fourteenth Amendment. It is obvious that Section 344(a) of the New York Civil Practice Act simply changed the "procedural considerations" in New York state courts which theretofore required foreign law, although found by the court, "to be presented as a question of fact." *United States* v. *Pink*, 315 U.S. 203, 220-221 (1942). Such a statutory procedural change merely dispensing with the technical common law rules of proof could not violate any constitutional right guaranteed to the petitioner by the Fourteenth Amendment.

It is axiomatic that a litigant has no property, in the constitutional sense, in any particular form of remedy. *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933). The Constitution of the United States does not undertake to control the

power of a state to determine by what procedure legal rights may be asserted or legal obligations enforced. *Honeyman* v. *Hanan,* 302 U.S. 375, 378 (1937); *Gelfert* v. *National City Bank,* 313 U.S. 221, 235 (1941); *McDonald* v. *Oregon Railroad and Navigation Co.,* 233 U.S. 665, 670 (1914).

We do not believe that further argument is necessary to show that the alleged federal constitutional questions are so plainly lacking in substance as to require no consideration by this Court.

CONCLUSION

The federal questions which the petition seeks to present were first raised in the Court of Appeals which, under its settled rules of practice, did not even consider, much less decide, these federal questions. This Court, therefore, is without power to review this case. Moreover, the assertion that Section 344(a) of the New York Civil Practice Act is repugnant to the due process clause of the Fourteenth Amendment is plainly lacking in substance.

The petition for a writ of certiorari to the Supreme Court of the State of New York, County of New York, should be denied.

Respectfully submitted,

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New York, N. Y., March 2, 1948.

APPENDIX A

References in plaintiff's Appellate Division briefs to the constitutional question raised in that Court.

(A) ***Plaintiff's Main Brief in the Appellate Division, Pages 30-31***

"In making its decision the Court apparently intended to take judicial notice of and to make findings as to the law of New Jersey under Section 344-a of the Civil Practice Act, but the Court seems not to have clearly distinguished between fact and law, and most of its findings are findings on the facts made after the sifting and weighing of evidence, or on erroneous theories of law not disclosed in the findings. The few true findings of law in the decision are erroneous, as has been shown.

It is plaintiff's contention, moreover, that disputed questions of New Jersey law, such as the rule and application of *Di Giendemonica* v. *Pennsylvania-Reading Seashore Lines,* supra, if either side believed it applicable and properly proved the same, should have been submitted to the jury for decision as questions of fact, and that Section 344-a of the Civil Practice Act insofar as it authorizes the Court to take judicial notice of foreign law and to find the same, in cases triable by jury, is unconstitutional and void.

Article 1, Section 2, of the Constitution of the State of New York, provides as follows:

'Sec. 2. (Trial by jury; how waived.)

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; * * *'

Prior to the enactment of Section 344-a of the Civil Practice Act, an issue as to what is the law of a foreign jurisdiction was a fact question, and in a case where trial by jury was matter of right, such question was tried and decided by the jury and not by the Court.

This was a most important right and permitted a party during the progress of a trial to know and understand what propositions of law of a foreign jurisdiction were being urged, with an opportunity of calling an expert on the law of such jurisdiction, should such law be in dispute.

Section 344-a of the Civil Practice Act purports to deprive a party of this right, and to permit the Court to make its independent research as to what the law of a foreign jurisdiction is, even on situations which have never been passed upon by the Courts of the foreign jurisdiction, and to make findings or charge the jury on his conception of such law, without any opportunity to a party whatsoever to correct mistakes and to present proof on that subject for submission to the jury.

While no cases have been found passing upon the constitutionality of Section 344-a of the Civil Practice Act, the Court of Appeals, in *Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N.Y. 246, suggests that a question of constitutionality is involved and that Section 344-a of the Civil Practice Act might be pronounced unconstitutional whenever the question is presented."

(B) ***Plaintiff's Reply Brief in the Appellate Division. Pages 21-22***

"The Constitutionality of Section 344-a of the Civil Practice Act Is Properly Before This Court.

Respondent's contention in this respect is seriously in error, and under Sections 461 and 445 of the Civil Practice Act, on appeal from a judgment entered on a directed verdict, an exception is deemed to have been taken to every ruling on every question of law.

One ground of liability urged by plaintiff on trial was under the doctrine of *Royal Indemnity* v. *Long Island Railroad, supra,* where this Court characterized a similar situation with reference to the operation of automatic signal systems as a potentially dangerous condition, and appellant relied upon the presumption that the common law of New Jersey was the same as that of New York.

No New Jersey decisions holding to the contrary were produced, and, as shown in appellant's original brief, it is not contributory negligence, as matter of law, in either New York or New Jersey, to cross a railroad while the automatic crossing signals are activated.

The Trial Court held, however, that *Di Giendemonica* v. *Pennsylvania-Reading Seashore Lines,* 123 N.J.L. 296 (fols. 725-726), was authority in New Jersey, contrary to *Royal Indemnity* v. *Long Island Railroad, supra,* and also for a holding of contributory negligence.

Since the New Jersey case, cited by the Court, involved a wholly different situation from the facts in *Royal Indemnity* v. *Long Island Railroad, supra,* and the case at bar, there was an issue of fact as to whether

the common law of New Jersey, on the situation at bar, was different from that of New York, which has always been a jury question, and that the right to trial of this question by the jury was guaranteed by the State Constitution, and that Section 344-a insofar as it impaired such right was unconstitutional."

APPENDIX B

Extracts from affidavit of Arthur A. Beaudry, sworn to September 23, 1947, in support of plaintiff's application for reargument in the Court of Appeals.

"16. At the very beginning of the trial, Mr. Justice Botein asked me whether New Jersey law was involved, and I told him at that time that the plaintiff was relying upon the common law and our rules of decision, particularly Royal Indemnity Co. v. Long Island Railroad Co., supra, except as to the New Jersey bell or whistle statute, which was clear in language and spoke for itself. The Court had been reading Royal Indemnity Co. v. Long Island Railroad Co., supra, and at the end of either the first or second day of the trial, Mr. Justice Botein called my attention to Di Giendemonica v. Pennsylvania-Reading Seashore Lines, 123 N.J.L. 296, which he said would be relied on by the defendant on the question of contributory negligence of the deceased driver of the automobile, and he asked me whether I could find a case in New Jersey holding as do Royal Indemnity Co. v. Long Island Railroad Co., supra, and Maiorano v. Long Island Railroad, 244 N. Y. 387, in this State, that crossing the railroad tracks at a crossing, when the warning signals are active, is not contributory negligence as matter of law, and in accordance with Mr. Justice Botein's request, I gave him, the next day, the case of Jones v. West Jersey & S. R. Co., 7 N. J. Misc. R. 841, 147 A. 381, holding as do the cases in this Court.

17. Mr. Justice Botein had several discussions with me during the trial concerning the evidence as to the

non-blowing of the whistle or sounding of the bell, and whether such evidence was positive or negative, and concerning the law and facts of Royal Indemnity Co. v. Long Island Railroad, supra, and the rule of negligence illustrated by that case, and at one time Mr. Justice Botein advised me that, as he analyzed the evidence, the plaintiff had made out a case sufficient to go to the jury, but, at a still later time, he told me that defendant's attorneys contended that Royal Indemnity v. Long Island Railroad, supra, stated no rule of negligence, but bore merely on the question of contributory negligence of the decedent, and when I explained the 'potential danger' referred to in that case and the rule of negligence applied, he referred to the case at bar as being unusual, and as 'sui generis'.

18. The fact that at the end of the entire case counsel for plaintiff offered the New Jersey statutes material to his case in evidence, and as shown by the record (fols. 718-719), there was some discussion, and the Court finally says that the statutes 'will be deemed in evidence', should indicate very clearly that it was never the understanding that all the statutes and common law of New Jersey were deemed before the Court without their being offered or shown or brought into the record by reference thereto.

19. At the finish of the case, and after the Court had indicated that he was about to grant the defendant's motion for a directed verdict, and the plaintiff's attorney attempted to show that the evidence submitted by him was sufficient to go to the jury, the Court expressed a doubt as to the sufficiency of the evidence as to the non-giving of the signals, and he expressed

the opinion that Royal Indemnity v. Long Island Railroad, supra, referred only to contributory negligence; he asked whether plaintiff's attorney had examined the New Jersey cases to see if the plaintiff's evidence would entitle him to urge some ground of liability under some New Jersey decisions other than the grounds presently being urged by plaintiff.

20. This occurred at about 12:30 or 1:00 P.M. of the day, and just before the noon recess, and plaintiff's attorney was willing to accept what he considered a kind suggestion from the Court, and which he still feels was made in kindness, and he requested until the next morning, but the defendant's counsel strenuously objected to that short delay and insisted that the trial finish that day, and the matter was put over until later in the afternoon, and because of the unexpected illness of a member of his staff, plaintiff's attorney was unable to avail himself of even that short opportunity to embrace the Court's kind suggestion (fol. 721)."